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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ARTHUR WEED,

Defendant and Appellant.

E047245

(Super.Ct.No. FSB060072)

OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed as modified.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald Jacob and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant David Arthur Weed appeals a judgment convicting him of first degree murder with special circumstances, second degree robbery of a Radio

Shack store, possession of an assault weapon, evading a police officer, and first degree robbery. There were also true findings made that a principal was armed with an assault rifle in the Radio Shack robbery, that defendant personally and intentionally discharged a firearm causing great bodily injury or death in connection with the murder, and that defendant acted in concert to enter a structure to commit a robbery in connection with the homicide.¹ Defendant received a determinate term of six years, eight months in state prison on the non-murder charges, plus an indeterminate term of life without the possibility of parole, plus 25 years to life, on the murder charge and its enhancements.

Defendant appeals, raising several contentions about the proceedings at trial and in connection with his sentence. We affirm.

FACTS AND PROCEDURAL HISTORY

A. Robbery and Murder of Shawn Nix

Defendant and his brother, James Dean, were acquainted with Quincy Porter. Porter was the stepfather of teenager Dorian Goodman. Goodman was involved in the crimes and testified at trial as part of a plea bargain.

Sometime near December 25, 2006, Goodman and Porter were riding in defendant's car with defendant and Dean. Dean was driving; Dean talked to Porter about someone he knew who had a lot of money and drugs. Porter was interested in getting some drugs, and maybe setting up business for himself. Dean told Porter where the

¹ Defendant was also charged with the robbery of another store, Auto Zone, but he was acquitted of those charges. The evidence relating to the acquitted charges will not be detailed here.

dealer, Shawn Nix, lived and suggested that they rob Nix. Porter, Dean, Goodman and defendant discussed the idea, and agreed to drive to Nix's house. Porter had a large handgun with him.

Dean drove to an apartment complex in Ontario. He parked the car and the four companions formulated a plan. Dean knew the victim, Nix, and he could introduce defendant as Dean's brother. They decided that Dean and defendant would go to the door first, and ask Nix for a "20"—a quantity of drugs—to gain entry. Defendant would then hit Nix over the head with a crowbar or tire iron he had taken from the car and concealed on his person. Porter decided that they should all wear gloves, but not masks; this would avoid arousing Nix's suspicions.

Dean knocked on the door as planned. He and defendant went inside the apartment. About 10 minutes later, Dean came outside and motioned to Porter and Goodman to come inside. When Goodman entered the apartment, he saw defendant holding the crowbar; Nix was in the corner looking scared. Goodman perched on the arm of the couch in the living room and watched what the other participants did.

Goodman saw Porter punch Nix in the face, and Nix began to bleed. Porter ordered Nix to lie face down on the floor, and he kept watch over Nix while defendant and Dean looked through the apartment for something to take.

Porter told Dean to take Goodman outside, back to the car. As Dean began to push or pull Goodman toward the door, Goodman continued to watch. He saw defendant, holding the gun, standing over Nix, and saw defendant shoot the victim. Defendant gave the gun to Porter, and Porter fired another shot to the victim's head.

On Christmas Day, 2006, Ontario police officers responded to a report of a dead person in Nix's apartment. Nix was lying face down on the floor in a pool of dried blood; it appeared that he had been dead for some time.

The medical examiner testified that the cause of Nix's death was two gunshots to the back of the head. Each bullet caused both an entry and an exit wound; the bullets were recovered from the floor underneath Nix's body. Nix had also suffered some kind of blunt force injury to the front of his head while still alive; this injury corresponded to Goodman's testimony that Porter had punched Nix in the forehead.

The December 2006 murder of Nix remained unsolved until the events of January 24, 2007.

B. The Radio Shack Robbery

On January 24, 2007, Aisha Allen was working in a Radio Shack store in San Bernardino, when three robbers in masks entered the store. One of the robbers put a gun in Allen's face and told her to open the safe. She explained that the safe had a time delay to open, so the robbers got nothing from the safe. One of the robbers jumped over the counter, and took about \$1,500 to \$1,800 from the register. The robbers warned the people in the store not to move, or they would be shot. Allen waited a few seconds, heard a car leaving, and peeked out to see a car speeding away.

Goodman testified that had been picked up from school that day; he did not remember who was in the car, but believed it had been Porter (his stepfather), with Dean and defendant. They went to Porter's and Goodman's apartment and played video games for a while. Goodman's uncle, Sean Lusk, also arrived. Porter, Lusk and defendant

decided to go to a casino in San Bernardino; Goodman tagged along. The men talked about needing money, and decided to rob a Radio Shack store. They stopped at the apartment to collect guns, gloves and masks.

As before, they took defendant's black or dark blue Dodge Intrepid. Defendant drove them to the Radio Shack store. Lusk stayed behind in the car, while Porter, defendant and Goodman donned masks and entered the store. Porter carried an assault rifle and defendant was armed with the same handgun that had been used in the Nix murder. Goodman identified Porter in pictures from the Radio Shack security camera as the robber holding the assault rifle. He also identified himself in various pictures, as well as defendant inside the store holding the handgun.

Goodman placed money from the cash register into a backpack he had brought into the store. They ran to the car and Lusk began to drive away. They were immediately followed by police.

Fortuitously, Officer Ireland of the San Bernardino Police Department had been flagged down by two women in the shopping center parking lot, who directed his attention to the Radio Shack store. Officer Ireland saw two or three men come running out of the store and enter a car parked in front. The car then sped away.

Officer Ireland pursued the fleeing vehicle, and was joined in the chase by a police surveillance helicopter. The fleeing car moved in and out of traffic, ran several red lights, and drove into a residential neighborhood. The driver was unable to negotiate a turn and crashed into another car. The doors opened and the occupants of the fleeing car got out

and ran away on foot. They were traced to a particular apartment in a nearby apartment complex. The suspects were eventually flushed out with tear gas and taken into custody.

San Bernardino police officers recovered an AK-47 assault rifle and its loaded magazine from the abandoned car, along with a beanie or mask, shoes, and packaging for electronic merchandise. Papers containing defendant's name were also found in the car.

A search of the apartment turned up the large handgun, a .30-caliber carbine pistol. The handgun was not a common weapon; it was capable of firing a .30-caliber rifle round. The searching officers also found defendant's wallet, a rental agreement in the name of Ronnie Lusk (Dorian Goodman's mother, wife of Quincy Porter and sister of Sean Lusk). Inside a small safe in the bedroom closet was ammunition for the .30-caliber handgun. The safe was opened with a key from Sean Lusk's key ring, found in a white car in the apartment garage. Black gloves, a ski mask, and the identification of Sean Lusk were also in the white car. One of the bedrooms had a bag containing \$1,516 and a check made out to Radio Shack, dated the date of the robbery. A shoe inside the apartment matched another found outside the crashed Intrepid.

When police surrounded the apartment, Goodman surrendered with his two younger siblings. The other suspects were hiding in the attic. Detective Harvey later interviewed Goodman, who told Harvey about the Radio Shack robbery.

The .30-caliber handgun was later linked to the Nix murder. Ballistics evidence showed that the gun recovered after the Radio Shack robbery, and seen on the video footage on the store's security cameras, was the same gun that had fired the shots that killed Shawn Nix. Detective Mitchell interviewed Goodman, and Goodman described

the Nix murder to him. Goodman drew a diagram of Nix's apartment and gave details of the killing and the taking of property from the apartment. Some of the details in Goodman's interview with Detective Mitchell varied from his trial testimony; for example, he told Detective Mitchell that Porter had shot first and then handed the gun to defendant, whereas Goodman's trial testimony placed the acts in the reverse order. Goodman also told Detective Mitchell that the men had taken baseball cards and a laptop computer from Nix's apartment, while at trial Goodman denied saying that a computer had been taken. By the time the apartment was searched, after the Radio Shack robbery a month later, no baseball cards or computer were found in the apartment.

Sean Lusk also testified at trial about the Radio Shack robbery, pursuant to a plea bargain. He stated that he recognized the handgun used in the robbery but claimed he did not know to whom it belonged. He stated that he, defendant, Porter and Goodman had gone to the casino on January 24, 2007, and then returned to Porter's and Goodman's apartment. Defendant, Porter and Goodman discussed what they might do, but Lusk claimed that he overrode their plans: "I took control of the situation and basically just enforced that everybody do what I say." In other words, Lusk claimed that he masterminded the Radio Shack robbery and forced all the others to participate. Lusk claimed that he "forced" defendant to drive the car to Radio Shack. He also claimed that he "enforced" Porter and Goodman to go with him inside the store, and that he had instructed defendant to stay in the car. Lusk admitted that he told Detective Harvey in his police interview that he had stayed in the car the whole time, and that he had driven the car away from the Radio Shack. He did not recall what the others were wearing, he could

not diagram the inside of the store, he could not remember the arrangements of items inside the store, and he could not specifically describe anything that Porter did. He denied that the car had been driven on the wrong side of the road or run any red lights; he did not pay attention to the police car giving chase, but was aware of a helicopter. Lusk claimed that he had not wanted Goodman involved in the robbery, because he was too young, but gave in to Goodman's pleading and allowed him to go. At the same time, he testified that he forced Goodman to go with them. Lusk testified that he could not identify who was who in the security pictures of the Radio Shack robbery.

Defendant was charged with the first degree murder of Shawn Nix, with special circumstances (count 7), second degree robbery in the Radio Shack incident (count 1), possession of an assault weapon in connection with the Radio Shack robbery (count 2), felony evading a police officer after the Radio Shack robbery (count 3), and first degree robbery of Nix (count 9). He was convicted of all these offenses, and the jury also found true allegations that a principal was armed with an assault rifle in the commission of the Radio Shack robbery, that defendant personally discharged a firearm causing great bodily injury or death in the Nix killing, that he had acted in concert to enter a structure to commit robbery of Nix, and allegations, including a special circumstance finding, that the murder was committed while engaged in the commission of robbery.

Defendant received a determinate sentence of six years, eight months, consisting of the middle term of three years on count 1, the Radio Shack robbery (the principal term), plus a consecutive middle term of three years for the assault rifle allegation in connection with count 1, plus a consecutive term of eight months (one-third the middle

term) on count 3 (evading an officer). The court imposed a term of eight months on count 3 (possession of an assault rifle), but stayed that sentence under Penal Code section 654.² The court imposed the aggravated term of six years on count 9 (robbery of Nix), plus a term of 25 years to life on the allegation that defendant had personally and intentionally discharged a firearm causing great bodily injury or death in connection with the robbery; the court stayed both terms connected to count 9.

The court imposed a sentence of life without the possibility of parole on count 7, the Nix murder with special circumstances, and ran that term consecutive to count 3. The court imposed a term of 25 years to life for the personal discharge of a firearm causing great bodily injury or death, but struck the finding that defendant had acted in concert to enter a structure with respect to count 7.

Defendant now appeals, contending (1) the evidence is insufficient to corroborate Goodman's accomplice testimony with respect to the Nix murder, (2) the trial court responded inappropriately to a jury inquiry, (3) Goodman's testimony should have been excluded, (4) the trial court erred in denying defendant's motion for a mistrial, (5) the instructions on the special circumstance were erroneous, (6) the sentence on count 9 (robbery of Nix) should be reduced, and (7) the parole revocation fine should be stricken. We now turn to the merits of these claims.

² All further statutory references will be to the Penal Code unless otherwise indicated.

ANALYSIS

I. The Accomplice Testimony Was Corroborated

Defendant argues that the counts related to the Nix homicide should be reversed, because there was insufficient corroboration of defendant's involvement in those crimes (murder, robbery). He contends that the testimony of Dorian Goodman, an accomplice, was the sole evidence connecting him to the Nix crimes.

Section 1111 provides in relevant part: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

The People argue that Goodman's testimony was sufficiently corroborated, citing three cases for the proposition that an accomplice's testimony may be corroborated by evidence connecting the defendant to a weapon like that used in the crime. (*People v. Trujillo* (1948) 32 Cal.2d 105, 111; *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1021; *People v. Medina* (1974) 41 Cal.App.3d 438, 446.)

The cases relied upon by the People do not quite stand for the cited proposition, that evidence connecting the defendant to a weapon like that used in the charged crime is sufficient to corroborate accomplice testimony implicating the defendant in the charged crime. In each of the cited cases, additional circumstances existed.

As the Supreme Court explained in *People v. Trujillo, supra*, 32 Cal.2d 105, it was not a single piece of evidence standing alone, but the "combined and cumulative weight of the evidence furnished by non-accomplice witnesses which supplies the test." (*Id.* at

p. 111.) Aside from the testimony of the accomplice, the prosecution had introduced evidence tending to show that the fatal bullet came from a gun the defendant had possessed before the crime, and was found in the defendant's room after his arrest. There was also a scarf found at the scene which other witnesses identified as the defendant's. Fibers from the defendant's clothing matched fibers at the scene, showing that the defendant had come into contact with the victim. Other witnesses gave evidence that a screwdriver found at the scene was like one the defendant had used previously. A hammer with the codefendant's initials was found at the scene, and the codefendant, upon arrest, sent his mother a telegram asking her to contact the defendant. The cumulation of all these items of evidence supported the accomplice's testimony that the defendant had been involved in the crime.

Similarly, in *People v. Barillas, supra*, 49 Cal.App.4th 1012, in addition to the accomplice testimony, there was evidence that another witness saw the defendant near the victim only moments before the victim was shot. The same witness testified that the defendant had fled after the shooting, and that the defendant "laughed" when the witness asked him what had happened. The victim had been killed with a .38-caliber bullet, and the defendant possessed a stolen .38-caliber gun after the shooting, which he later disposed of. The defendant also told another witness that he "might have shot and killed somebody." Yet another witness heard the defendant say he had shot "this white fool," and still another witness saw a vehicle like the defendant's leaving the scene of the murder. Earlier the same evening, the defendant had used the same vehicle in company with the same accomplice to commit other crimes. (*Id.* at p. 1021.)

People v. Medina, supra, 41 Cal.App.3d 438 is perhaps the closest analogue to the instant case. There, independent evidence established that the defendants were in company with the accomplices both a few hours before, and shortly after the murders were committed. In addition to evidence placing the defendants at the scene, there was other evidence showing that the defendants had possessed knives of a similar kind to the weapons that inflicted the fatal wounds. (*Id.* at p. 466.) The court stated that evidence placing a defendant at the scene of a crime is not sufficient corroboration in and of itself, but may be sufficient when combined with evidence “showing that defendants had in their immediate possession weapons corresponding to those used in the murders.” (*Ibid.*) In another case, “*People v. Henderson* [(1949)] 34 Cal.2d 340, 345-346[,] the accomplice’s testimony was held to be sufficiently corroborated by evidence of the defendant’s presence at the scene with the accomplice and by proof that he had recently purchased a gun of the kind (a .410 shotgun) used in the robbery.” (*Ibid.*)

We must keep in mind, however, the proper rules for corroborating evidence. The requisite corroboration “must, without aid from the accomplice’s testimony, connect the defendant to the charged offense, but may be circumstantial, slight and entitled to little consideration when standing alone. [Citations.] Corroborating evidence need not be sufficient to establish the defendant’s guilt or corroborate the accomplice to every fact to which the accomplice testified. [Citations.] It must raise more than a suspicion or conjecture of guilt, and is sufficient if it connects the defendant with the crime in such a way as to reasonably satisfy the trier of fact as to the truthfulness of the accomplice. [Citations.]” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1177-1178.)

The evidence here was sufficient to meet the standard of “slight evidence” to connect defendant to the crimes.

Goodman testified that defendant and his brother first approached Nix’s apartment, using Dean’s acquaintance with Nix to gain entry. The plan was for defendant to hit Nix with a crowbar or tire iron he concealed on his person, to secure the scene and gain admittance for Porter and Goodman. Goodman believed that defendant had carried out this plan, because when he entered Nix’s apartment, defendant was standing near Nix holding the crowbar, while Nix was screaming, and defendant was yelling at Nix to be quiet. The pathologist found a blunt force injury to the front of Nix’s head, which could have resulted either from a fist strike or an implement such as a tire iron. However, the blunt force blow was accompanied by a laceration, which results from the application of force that hits a bone underneath the skin. That was more likely to result from a strike with something like a tire iron, than from a fist. There was also a small circular blunt force injury just to the left of the laceration. The physical findings corroborated Goodman’s account of the non-lethal portion of the attack on Nix.

There were two shots fired in the Nix killing, stated by Goodman to have been by two different shooters. One gunshot went directly through the victim’s brain on a slight upward angle from front to back. The second shot³ was at a very low angle. The entry and exit wounds on the low-angle shot were much closer together, and the bullet had been deflected along the victim’s skull, causing a great deal of skull fracturing. A

³ The pathologist testified that the shots could have been fired in either order.

fragment of bone was found on top of the entertainment center. One bullet was relatively intact. The other was much more fragmented. Only one ejected shell was recovered at the scene; it was found on top of the stove. No other shell was located despite an intensive search over several hours. This indicates that one shell may have been picked up by the killers, but the remaining shell was in an unusual location and thus overlooked. All this evidence was consistent with Goodman's description that there were two different shooters: he said that Porter had stood nearer to the victim's head, and defendant had stood behind Porter.

There were no pry marks or other signs of damage on any of the doors, indicating that there was no forced entry. This was consistent with Goodman's account of the robbery and murder. According to Goodman, it was defendant's brother, James Dean, who knew the victim and suggested him as a target. Nix was a known drug dealer, who would be suspicious of people approaching the door whom he did not know. That is why Dean and defendant went to the door first to gain entry. Nix would open the door for Dean, and would accept Dean's introduction of defendant as his brother. There was no other reason why Nix would have been selected for invasion and robbery, aside from Nix's connection to defendant's brother. It also explained why the robbers went in defendant's car.

Detective Mitchell was asked if there was any "hard . . . forensic evidence" belonging to defendant which was found at Nix's apartment; he responded, "Yes," "The shell casing." The shell casing found at the Nix murder scene was matched to the large handgun recovered from the Porter/Lusk apartment after the Radio Shack robbery. The

surveillance pictures from the Radio Shack robbery showed defendant holding the same gun during that crime. Although Sean Lusk testified that it was he depicted in the pictures, not defendant, the jurors could see the photographs for themselves.

The still photos taken from the videotape, exhibit Nos. 19 through 23, show the three robbers who actually entered the Radio Shack. From those photos the jurors could easily deduce that defendant was holding the same gun as was used in the Nix murder. The murder weapon itself is exhibit No. 88 in evidence and subject to comparison to the weapon depicted in the hand of one of the robbers in exhibit No. 22.

Sean Lusk testified that Quincy Porter was armed with the AK-47 rifle during the Radio Shack robbery. Dorian Goodman identified Quincy Porter as holding the AK-47 in exhibit Nos. 19 and 20.

Exhibit No. 19 depicts a rather large man entering first, holding what appears to be a rifle in his hand.⁴ Dorian Goodman testified that Quincy Porter was about 6 feet tall and weighed 200 pounds. Goodman testified that Porter was the person holding the assault rifle in exhibit No. 19.

Dorian Goodman testified that he was 5 feet 4 inches tall and weighed 135 pounds. Exhibit No. 20 shows the same large man as depicted in exhibit No. 19 holding the rifle as he walked further down the aisle. Dorian Goodman identified a person of much smaller stature shown in the lower left hand corner of exhibit No. 20 as being himself. That person is dressed in very dark colors, and the sweatshirt that he is wearing

⁴ The image of the rifle is somewhat pixilated, but is clearly too long to be a handgun.

has the hood up over his head. That is the only robber depicted in the exhibits with a hood up. Dorian Goodman is the only one of the robbers who is wearing white shoes. He testified that they were the “Dunks.” The other two robbers have on dark colored shoes. The other two robbers as depicted in the exhibits have beanie type masks pulled down to conceal their faces

Exhibit No. 21 depicts the third robber. His shirt is a very dark color, and he looks similar to the depiction of Quincy Porter in exhibit Nos. 19 and 20, except Porter’s top, as seen in exhibit Nos. 19 and 20, is a lighter color than the person in exhibit No. 21. The person depicted in exhibit No. 21 is also large, appearing to be about the same size as the person identified as Quincy Porter in exhibit Nos. 19 and 20. Dorian Goodman identified the person in exhibit No. 21 as defendant. The person depicted in exhibit No. 21 appears to be pointing the index finger of his right hand in the general direction of a male who is cowering on the floor, but rather than a pointed finger, it might also be a handgun. It is not that clear.

Next, exhibit No. 22 shows the same person depicted in exhibit No. 21, identified by Dorian Goodman as defendant, holding a very large light colored pistol in his right hand.

Finally, exhibit No. 23 depicts the small-statured robber with his hood up, leaving with a bag in his hand. Dorian Goodman identified that person again as himself, and he testified that the bag he was carrying was the bag he used to place the money from the cash register into. Aisha Allen identified the small statured person in the exhibits as the one who went behind the counter and took the money and put it into the bag. Sean Lusk

also testified that it was Dorian Goodman's assigned job to get the money during the robbery. None of the five exhibits depict the small statured robber with a firearm of any kind in his hand.

Dorian Goodman testified three separate times during the trial. The jury, completely independent of Dorian Goodman's own testimony that he was 5 feet 4 inches and 135 pounds, had three opportunities to determine for themselves Goodman's stature and compare his size to that of defendant, who was present during the trial. They could then compare any size differences they observed in open court to the three robbers depicted in the exhibits. Two of the robbers depicted in the exhibits were large and appeared to be about the same size. The third was noticeably much smaller than either of the other two.

Sean Lusk corroborated Dorian Goodman's testimony that his stepfather, Quincy Porter, was armed with the AK-47 rifle. If that were believed by the jurors, then the jurors could infer that the person carrying the rifle in exhibit Nos. 19 and 20, and wearing the lighter colored top, was Quincy Porter. Then, based on their observations in court of defendant and Dorian Goodman, the jurors could easily infer, due to the size difference, that the person holding the light colored pistol in exhibit No. 22 was the defendant. He was the only other large man depicted in the five exhibits. By the process of elimination, if Dorian Goodman was smaller than Quincy Porter and defendant based on jurors' in-court observations of the difference in sizes between defendant and Dorian Goodman, defendant had to be the person holding the murder weapon during the Radio Shack robbery.

In short, independent evidence shows that defendant was acquainted with and participated in invasion style robberies with a group of people with several overlapping members. The same vehicle, belonging to defendant, was used in both the Nix and the Radio Shack offenses. The same firearm—belonging to Porter⁵—that had been used in the Nix murder, was also visible in defendant’s hand during the Radio Shack robbery. That firearm was recovered hidden in a cabinet upstairs in the apartment after the robbery; its hiding place was accessible to any of the three robbers—defendant, Porter, or Sean Lusk—who had retreated to the upper floor to hide in the attic of the apartment. This met the standard of “slight” evidence to connect defendant to the commission of the Nix crimes, and was sufficient to satisfy the trier of fact as to the truthfulness of Goodman’s testimony. (*People v. Davis* (2005) 36 Cal.4th 510, 543.)

II. The Court Properly Responded to a Juror Inquiry

Defendant next contends that the trial court erred in its reply to an inquiry from the deliberating jury about “supporting evidence” to Goodman’s testimony: “Can evidence submitted by prosecution that was obtained by prior interview with Dorian Goodman (e.g.—the drawing of murder scene) be considered supporting evidence?”

⁵ Goodman testified that the .30-caliber handgun belonged to Porter. Ammunition for the gun was found in a locked box or safe in Porter’s bedroom. Lusk claimed not to have seen the gun before the Radio Shack robbery, and also stated he did not know who owned it, but he did admit recognizing the gun as the one used in the Radio Shack robbery. He stated that he and the other coparticipants in the robbery first went to a casino, then returned to his sister’s (and Porter’s) apartment to plan the robbery. Lusk was an accomplice in the Radio Shack robbery, but he was not an accomplice in the Nix crimes. Lusk was in state prison at the time of the Nix homicide. His release date was December 23rd or 24th, which was about the time of the murder.

The court answered, “I want to refer you back to the instruction requiring corroborating evidence. There are other instructions I needed you to also . . . take a look at. [CALCRIM No.] 318 is prior statements as evidence. Take a look at that again. [¶] And to answer your question are the statements of Dorian Goodman to include a diagram evidence? *They are not corroborating evidence because they are statements of Dorian Goodman.* I want you to examine all of the remainder of the evidence, testimony, as well as items that have been submitted to you in evidence to determine if there is corroborating evidence.” (Italics added.)

Juror No. 3 indicated that this reply did not fully answer the jurors’ concerns: “in the number of the specific counts, . . . the evidence we have comes from Dorian [Goodman]. We have a problem with the issue of we know how to treat Dorian’s testimony as evidence that requires some supporting evidence. [¶] . . . We are looking for additional evidence to support that. And [it] seems the only other evidence that we are finding to support that is evidence that came from other sources. [¶] For instance, Detective Mitchell’s testimony of his interview with Dorian. We could consider that supporting evidence, but yet the evidence provided by Detective Mitchell is evidence from his interview with Dorian, so it still comes from Dorian. [¶] . . . [T]his is where we are having a hard time distinguishing between Dorian’s direct testimony here versus testimony, other things that might have come from—it seems everything . . . comes from Dorian we [are] just having a hard time that things came from Dorian might be separate from the testimony we heard during the trial.”

The court responded, “That’s why I wanted to refer you to the prior statements as evidence. That one factor. [¶] Corroborating evidence is another factor. There are a number of items, photographs, et cetera, that have been submitted into evidence. I want you to examine all of those to determine if there is corroborating evidence. [¶] Okay. That’s about the best I can do for you. . . .”

Defendant urges that the court’s remarks did not fully advise the jury that in-court or out-of-court statements or other matters (such as the diagram of Nix’s apartment) originating from Goodman could not be considered corroborative of Goodman’s own testimony. We disagree. The court’s remarks plainly informed the jury that matters such as Detective Mitchell’s testimony concerning Goodman’s police interview, or Goodman’s drawing of the apartment, “are not corroborating evidence because they are statements of Dorian Goodman.” The court properly redirected the jury’s attention to photographs, documents, and other evidence to find independent corroboration of Goodman’s trial testimony, as well as referring the jury to the accomplice corroboration instructions. A jury inquiry ““does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury’s request for information. . . .” [Citation.]’ [Citations.]” (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 316-317.) “When the trial court responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court’s response should be modified or clarified must make a contemporaneous request to that effect; failure to object to the trial

court's wording or to request clarification results in forfeiture of the claim on appeal. [Citations.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 802.) Defendant never requested further clarification after the trial court admonished the jury to refer back to the instructions and the other evidence.

III. Goodman's Testimony Was Not Coerced

Defendant contends that the trial court erred in allowing Goodman to testify; in pretrial motions, defense counsel indicated that defendant "believes that [Goodman's] testimony should be excluded as being unreliable. And, also, that he did not receive proper admonishments as to *Miranda* rights [¶] . . . [¶] . . . And, again, as basis of his rights being violated, he believes the statement is unfairly obtained and unfairly used against him." The court replied that defendant did not have standing to object to the violation of Goodman's rights to gain suppression of Goodman's statements, although it invited the defense to raise the issue again if it found some authority to the contrary. Defense counsel did not raise the matter again.

Now, defendant urges that Goodman's testimony was "unreliable" because it was coerced by Goodman's plea bargain: he was necessarily required to testify at trial in conformance to his prior statements to the police.

Unfortunately for defendant, no objection was ever made on the ground that Goodman's testimony was coerced. The claim is waived. (*People v. Sully* (1991) 53 Cal.3d 1195, 1216.)

However, to forestall defendant's further claim that his counsel was ineffective in failing to raise the issue, we address the merits.⁶ (See *People v. Reyes* (2008) 165 Cal.App.4th 426, 433-434.) Goodman's testimony was properly admitted. Similar contentions have already been resolved against defendant's position in other cases. This is not a case, as in *People v. Medina, supra*, 41 Cal.App.3d 438, in which the accomplice's plea bargain was conditioned upon the witness's trial testimony conforming to statements already given to law enforcement. (*Id.* at pp. 450-456.) Rather, Goodman's plea bargain parallels *Reyes, supra*. There, the accomplice had entered into a plea bargain which required him to testify fully and truthfully at the defendant's trial, and also contained a separate provision that the contents of his police interview also had to be found to be substantially truthful. (*Reyes*, at pp. 434-435.) Likewise, Goodman's plea bargain here required him to testify fully and truthfully at defendant's trial, and also that he had to have been truthful in his police interview.

Similarly, in *People v. Garrison* (1989) 47 Cal.3d 746, the California Supreme Court found no impropriety in a plea agreement which bound the accomplice to testify truthfully at the defendant's trial, and which also contained a provision that the accomplice "'has already truthfully stated to the investigating detectives what happened in this case.'" (*Id.* at p. 770, italics omitted.) The California Supreme Court held this was not an impermissible coercion of the witness's testimony: "[The witness] was never told that he had to testify to the same story he had already told police and he never agreed

⁶ The claim that Goodman's testimony was coerced applies to all the offenses of which defendant was charged, and not just the Nix crimes.

to so testify. Nor was he told that the deal would be off if his trial testimony differed from the prior story. It is apparent that the district attorney *expected* [the witness] to testify to the same story at trial. It is a rare case indeed in which the prosecutor does not discuss the witness's testimony with him beforehand and is assured that it is the truth. However, unless the bargain is expressly contingent on the witness sticking to a particular version, the principles of *Medina* . . . are not violated." (*Id.* at p. 771.) "Thus, what the Supreme Court considers forbidden is an express agreement to testify in accordance with a prior statement or version, not simply an undertaking as to the truth of the prior statement. Under *Garrison's* rule and analysis, the interview provision [here] cannot be deemed invalid." (*People v. Reyes, supra*, 165 Cal.App.4th at p. 435, fn. omitted.)

Because Goodman's testimony was not improperly coerced, defendant's counsel was not incompetent in failing to pursue an objection on that ground. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674].)

IV. The Motion for a Mistrial Was Properly Denied

Defendant moved for a mistrial below when a juror happened to be in the hallway where defendant being escorted in full restraints, including waist and ankle chains. The court denied the motion, stating, "there's mechanisms [*sic*] short of mistrial that can safeguard the defendant's rights. [¶] I don't think it's a surprise to anybody that he is in custody." The court offered to make any admonition that defense counsel desired. The court also pointed out that the jurors likely had seen other persons in shackles being transported to courtrooms on that floor. Defense counsel said he would "think about" the

matter and “formulate something” for the court, but in fact the matter was never referred to again.

We review the matter of the mistrial motion under an abuse of discretion standard. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)

First, as the People point out, defense counsel’s motion for a mistrial established that one of the jurors was not taken by the bailiff to the courtroom at the same time as the others, before defendant was escorted through the hallway. That single juror arrived in the courtroom later than the others. Nothing shows definitively whether the juror actually viewed defendant in restraints or not.

Second, even assuming the juror did see defendant wearing chains, the record fails to establish prejudice. “Prejudicial error does not occur simply because the defendant ‘was seen in shackles for only a brief period either inside or outside the courtroom by one or more jurors or veniremen.’ [Citation.]” (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 584.) There was no abuse of discretion in denying the motion for mistrial.

V. The Special Circumstance Instructions Were Not Prejudicial

Defendant argues that the special circumstance finding attending the murder conviction must be reversed because the trial court failed to give any instructions upon the special circumstance. The People respond that the court did give at least one instruction on the requirements for finding the special circumstance true, and in any case the issues within the special circumstance finding were covered by other given instructions.

We agree that the instructional error was harmless in this case. The trial court should have given CALCRIM No. 730, concerning special circumstances based on murder committed while engaged in the commission of a specified felony, including robbery. Section 190.2, subdivision (a)(17)(A) provides that a special circumstance may be found if “[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [¶] (A) Robbery in violation of Section 211 or 212.5.” Under the instruction (CALCRIM No. 730), the elements of a robbery-murder special circumstance in this case would include:

(1) Defendant committed or aided and abetted a robbery;(2) Defendant intended to commit or intended to aid and abet the robbery; (3) Defendant did an act that caused the death of another person; (4) The act causing the death and the robbery were part of one continuous transaction; and (5) There was a logical connection between the act causing the death and the robbery.

The instructions the jury did receive informed it that defendant was charged with robbery, and with murder under a felony-murder theory. The jury was required to find that defendant committed robbery, that he intended to commit robbery, and that while committing the robbery, he did an act that caused the death of the victim. (CALCRIM No. 540A.) The court also gave similar instructions on an aiding and abetting theory. The aiding and abetting instructions included elements that defendant aided and abetted a robbery, he intended to aid and abet the robbery, a perpetrator did an act causing the death of the victim, and there was a logical connection between the act causing the death

and the robbery. (CALCRIM No. 540B.) The court gave further instructions on the concept of “one continuous transaction,” stating: “In order for the People to prove that the defendant is guilty of murder under a theory of felony murder . . . *and that the special circumstance of murder committed while engaged in the commission of [robbery] is true . . .*, the People must prove that the [robbery] and the act causing the death were part of one continuous transaction.” (CALCRIM No. 549, italics added.) In determining whether the robbery and the murder were part of one continuous transaction, the jury was instructed to consider such matters as whether the crimes occurred at the same place, the time period between the felony and the killing, whether the killing was committed to aid the commission of the felony or aid in escape, whether the killing occurred after the felony but while the perpetrators still exercised control over the person who was the target of the felony, and other matters. CALCRIM No. 252 informed the jury that certain specific intents were required for the crimes of robbery, flight from an officer, murder, intentional use of a firearm, intentional discharge of a firearm, and intentional discharge of a firearm causing death.

The instructions that the court did give essentially covered the elements of the special circumstance: (1) Defendant’s commission of or aiding and abetting the robbery; (2) Defendant’s intent to commit or aid and abet the robbery; (3) Defendant’s act causing Nix’s death (or his aiding and abetting Porter in doing the same); (4) The robbery and the act causing death were part of a continuous transaction; and (5) A logical connection between the death and the robbery. Where all the elements or issues were covered by proper instructions actually given, there is no error, or any error in failing to give

additional instructions is harmless. (*People v. Pulido* (1997) 15 Cal.4th 713, 715-716, 726-727 [factual question posed by omitted instruction was necessarily resolved by other proper instructions].)

““We have consistently held that when a trial court fails to instruct the jury on an element of a special circumstance allegation, the prejudicial effect of the error must be measured under the test set forth in *Chapman v. California* [1967] 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705]. [Citations.] Under that test, an error is harmless only when, beyond a reasonable doubt, it did not contribute to the verdict. (*Chapman, supra*, at p. 24 [87 S.Ct. at p. 828].)’ [Citation.] We have held that ““error in failing to instruct that a special circumstance contains a requirement of the intent to kill is harmless [beyond a reasonable doubt] when ‘the evidence of defendant's intent to kill . . . was overwhelming, and the jury could have had no reasonable doubt on that matter’”” [Citation.]” (*People v. Carter* (2005) 36 Cal.4th 1114, 1187.)

Here, the evidence of defendant’s intent to kill was overwhelming, and no one could have any reasonable doubt as to that intent. Defendant voluntarily participated in a home invasion robbery of Nix. He struck Nix with a crowbar to subdue and cow him, and Nix was then held face-down on the floor at gunpoint as various of the participants ransacked the apartment, looking for something to steal. Both Porter and defendant stood directly over Nix and shot him point-blank with a large handgun firing a devastatingly destructive .30-caliber rifle round. Nix’s body was not discovered until some time after the killing; the killing facilitated the robbers’ getaway, as their identity was traced only after their arrest in the Radio Shack robbery. There was absolutely no ambiguity or doubt

as to defendant's intent to kill (necessarily found in the jury's true finding on the separate allegation of intentional personal discharge of a firearm causing death). Any error in the special circumstance instructions was harmless beyond a reasonable doubt.

VI. The Sentence Imposed on Count 9 Is Proper

Defendant complains that the stayed sentence on count 9 (robbery of Nix) should be reduced from six years to four years, because the jury did not return a true finding as to that count that defendant had acted in concert in committing the robbery. That is, the only form the jury was provided for that finding referred to count 7, the murder, instead of count 9, the Nix robbery.

The People respond that the third amended information did allege, with respect to both count 7 (the Nix murder) and count 9 (the Nix robbery) that defendant had committed the offense of robbery in concert with two or more individuals within the meaning of section 213, subdivision (a)(1)(A). The jury was instructed with CALCRIM No. 1601, which was applied to both the murder and the robbery counts.⁷ The jury was

⁷ CALCRIM No. 1601, as given in this case, stated: "The defendant is charged in Counts 8 and 9 [*sic*: counts 7 and 9, as count 8 was dismissed] with robbery by acting in concert with two or more other persons. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant personally committed or aided and abetted a robbery; [¶] 2. When he did so, the defendant voluntarily acted with two or more other people who also committed or aided and abetted the commission of the robbery; [¶] AND [¶] 3. The robbery was committed in an inhabited dwelling. [¶] A dwelling is *inhabited* if someone lives there and either is present or has left but intends to return. [¶] To decide whether the defendant or [*sic*] committed robbery, please refer to the separate instructions that I have given you on that crime. To decide whether the defendant or [*sic*] aided and abetted robbery, please refer to the separate instructions that I have given you on aiding and abetting. You must apply those instructions when you decide whether the People have proved robbery in concert. [¶] To prove the crime of

[footnote continued on next page]

provided a verdict form in connection with count 7, the murder charge, and expressly found true allegations both that defendant acted in concert with two or more other persons under section 213, and that the murder occurred during the commission of robbery. Thus, the People argue, the jury necessarily determined that defendant acted in concert, both with respect to the Nix murder and with respect to the Nix robbery. First degree robbery in concert constitutes a separate enhancement which must be pleaded and proved (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 483-484 [Fourth Dist, Div 2]), but here the matter was pled, proven and found true by the jury under instructions which applied to both the murder and the robbery charges. The People argue that it was therefore proper for the trial court to impose the middle term of six years on the enhanced offense of first degree robbery in concert.

We agree. Section 213, subdivision (a)(1)(A) provides for an alternate punishment scheme for first degree robbery that is committed in concert with two or more other persons, and committed within an inhabited dwelling. The trial court realized that, although the verdict form referred to count 7, the murder, the specific finding that defendant acted in concert to commit robbery in an inhabited dwelling cannot apply to a charge of murder. The court therefore dismissed the allegation as to count 7, the murder. But the robbery in concert issue was alleged in the information as to count 9, the robbery of Nix; that theory was tried and argued to the jury, the jury was instructed on that issue

[footnote continued from previous page]

robbery in concert, the People do not have to prove a prearranged plan or scheme to commit robbery.”

in relation to count 9, and the jury made all the findings necessary to return the sole verdict form they were given on the issue. The jury necessarily determined all of the elements appropriate to the finding, which was alleged, charged, and proven with respect to count 9, the Nix robbery. The denomination on the verdict form that the finding related to count 7 amounted to no more than a clerical error, inasmuch as the issues plainly related solely to the first degree robbery charged in count 9. “A trial court may correct a clerical error, but not a judicial error, at any time. A clerical error is one that is made in recording the judgment; a judicial error is one that is made in rendering the judgment. [Citations.]” (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205.)

The trial court therefore properly applied the sentencing scheme of section 213, subdivision (a)(1)(A) to defendant’s sentence on the robbery in count 9, and imposed the middle term of six years.

The abstract of judgment will need to be corrected, however, to reflect the proper sentence on count 9. The term of six years represents the middle term under the enhanced punishment range for first degree robbery in concert in an inhabited dwelling, rather than the upper term of six years on first degree robbery. The abstract of judgment should therefore be marked “M” on count 9, rather than “U.”

VII. The Parole Revocation Restitution Fine Should Be Stricken

Finally, defendant urges that the parole revocation restitution fine imposed and stayed under section 1202.45 should be stricken, because it is improper to impose such a fine where the defendant is sentenced to a term of life imprisonment without possibility

of parole, “as the statute is expressly inapplicable where there is no period of parole.”
(*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) The People concede the issue.

DISPOSITION

The judgment is affirmed, with the exception that the parole revocation restitution fine should be stricken. In addition, the abstract of judgment should be corrected to reflect the selection of the middle term on count 9, rather than the upper term (“M” instead of “U”), because the court properly applied the enhanced sentencing scheme under section 213, subdivision (a)(1)(A). A copy of the corrected abstract of judgment shall be transmitted to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKINSTER

J.

We concur:

/s/ HOLLENHORST

Acting P.J.

/s/ MILLER

J.